UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

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PLAINTIFFS' RESPONSE TO CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION OF NON-PARTIES WISCONSIN SENATE AND ASSEMBLY FOR CLARIFICATION OF THE COURT'S DISCOVERY ORDER

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

The legislature—flying the flag of "clarification"—asks the court to *reconsider* its December 8 order rejecting the legislature's sweeping assertion of privilege for its "demographic" consultant, Joseph Handrick. There is nothing to clarify, let alone reconsider. The Court could not have been more clear: Mr. Handrick "acted as a consultant," and "his communications are not covered by attorney-client privilege." Dec. 8 Order (Dkt. 74) at 3-4. The legislature's latest pleadings change nothing, and what it seeks to clarify is itself unclear. Although the Court has cautioned counsel about anti-discovery tactics, the suggestions apparently have not been heard.

Mr. Handrick is a lobbyist. *See* Bradshaw Decl., ¶ 2, Ex. 1 (lobbyist records). He is not a lawyer; no law firm is his client. He never was retained by a party. Yet, because of his direct involvement in redistricting, both parties list him as a potential witness. And the legislature doesn't want him to say anything.

In first moving to quash his subpoena, the legislature made a blanket assertion of privilege that consumed time but lacked merit. The legislature, misperceiving its stake in this

action, prevails when it delays: plaintiffs bear the initial burdens, and trial is set. While depositions have been delayed, plaintiffs have yet to see documents from the legislature.

The legislature's argument remains unchanged from its motion to quash, which explained that Mr. Handrick "assisted counsel for the Senate and Assembly in the provision of legal advice." Mot. to Quash (Dkt. 63) at 2. The latest motion only repeats: "he assisted outside legal counsel for the Senate and Assembly in counsel's provision of legal services ...." Mot. to Clarify (Dkt. 77) at 2. Having first asserted that Mr. Handrick "is not subject to discovery of any kind" because he is "a retained, non-testifying expert," Mot. to Quash at 1-2, the legislature says again he derives protection as "a retained, consulting expert," Mot. to Clarify at 3. Nothing new.

The engagement letter explains that Mr. Handrick's retention as a consultant "on Wisconsin demographic matters" was "in anticipation of potential litigation." McLeod Decl. (Dkt. 78) Ex. 1. Having raised the specter, the legislature now cites that premonition to invoke an unfounded privilege. Mr. Handrick was hired by the legislative leadership, not the law firm, and the legislature—not the firm—pays Mr. Handrick's bills. *Id.* Although the legislature now characterizes him as an "expert," the engagement never describes him as such.

The legislature cannot shield itself from scrutiny by contracting out the development of legislation to lobbyists and attorneys and then claiming work-product protection because the resulting constitutional challenge was predictable.[1] Mr. Handrick is a contractor who helped draw the district boundaries in Acts 43 and 44. Although history makes redistricting lawsuits

[1] "It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power." *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002). Although *In re Witness* addressed a state lawyer's refusal to disclose communications with a state officeholder, there is no reason to distinguish consultants likewise paid for by the taxpayers. And whether or not criminal allegations are involved, the "federal government's interest in enforcing voting rights statutes is, without question," an "important federal interest[]" like "the enforcement of federal criminal statutes." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-5065, 2011 U.S. Dist. LEXIS 117656, at *22-23 (N.D. Ill. Oct. 12, 2011). The legislature's reliance on its hiring of a consultant and outside counsel to try to block any inquiry into its redistricting project is not only procedurally improper but also an abuse of the privilege.

predictable (Texas, Illinois, Ohio), legislating is not an act performed "in anticipation of potential litigation." The legislature relied on outsiders to carry out its constitutional duty. *See* Bradshaw Decl., ¶¶ 3-4, Ex. 2-3 (senate and assembly motions authorizing retention of legal counsel for "apportioning and redistricting"); *id.* ¶ 5, Ex. 4 (letter from minority leadership criticizing majority for hiring outside counsel rather than relying on state employees). "Materials prepared in the ordinary course of a party's business, even if prepared at a time when litigation was reasonably anticipated, are not protected work product." *Cont'l Cas. Co. v. Marsh*, No. 01-0160, 2004 WL 42364, at *8 (N.D. Ill. Jan. 6, 2004). Mr. Handrick "was an active participant in the events which form the subject matter of this litigation," and plaintiffs "are entitled to whatever discovery of him they may deem appropriate." *Marylanders for Fair Rep'n v. Schaefer*, 144 F.R.D. 292, 303 (D. Md. 1992). The legislature has not shown that Mr. Handrick's expertise—whatever it may be—warrants protection. A third party's communication with an attorney is not "shielded ... solely because [it] proves important to the attorney's ability to represent the client." *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

Even if work-product protection were applicable, plaintiffs have a substantial need and are unable to reach the evidence another way. *See* Fed. R. Civ. P. 26(b)(3). "[P]roof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence" for plaintiffs' Voting Rights Act and the Equal Protection claims, 12/8/11 Order at 3, and only the legislature or its consultants have evidence of legislative intent. Plaintiffs' need for this discovery is particularly acute where plaintiffs have tried, unsuccessfully, to obtain discovery from defendants themselves. Defendants' counsel, the Department of Justice, claims it represents the Government Accountability Board alone and has no access to legislative materials—despite the fact that the Attorney General "act[s] in a representative capacity *in behalf of the legislature* and the people of the state to uphold the constitutionality of a statute of

statewide application." *Ziegler Co. v. Rexnord, Inc.*, 139 Wis. 2d 593, 612-13, 407 N.W.2d 873 (1987) (emphasis added).

The facts remain: Mr. Handrick is a lobbyist who "performed consulting work in connection with the redistricting legislation." 12/8/11 Order at 3. "[D]ocuments concerning 'advice on political, strategic or policy issues, [although] valuable ..., [are] not ... shielded from disclosure by the attorney-client privilege.'" *Evans v. City of Chicago*, 231 F.R.D. 302, 312 (N.D. Ill. 2005) (quoting *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)). The Court, in denying the first assertion of privilege, already has recognized that these services also involved a law firm's "representation of the State Senate and State Assembly." 12/8/11 Order at 3. But the law firm's status and privilege are not at issue: Mr. Handrick is. This motion "clarifies" nothing the Court did not already know and say. It should be denied.

Dated: December 16, 2011.

GODFREY & KAHN, S.C.

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